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CLAUSEWITZ ON TRIAL:
AN APPLICATION OF MILITARY STRATEGIC THOUGHT
TO LITIGATION

by

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Biography

Lieutenant Colonel Melinda L. Davis-Perritano is a student at the Air War College, Maxwell Air Force Base, Alabama. Colonel Davis-Perritano entered the Air Force in 1991 as a direct appointee. She is a designated judge advocate. In 1987, Lieutenant Colonel Davis-Perritano earned a Bachelor of Arts degree in psychology from McMurry Methodist University in Abilene, Texas. In 1990, she was awarded the degree of juris doctor from Saint Mary's School of Law in San Antonio, Texas. She is licensed to practice law in the State of Texas and is admitted to practice before the Armed Forces Court of Military Appeals and Air Force Court of Criminal Appeals. She served as the Staff Judge Advocate for McGuire Air Force Base and the Staff Judge Advocate for Goodfellow Air Force Base. Prior to serving in these positions, she served as the Executive Officer to the Air Force Legal Services Agency Commander and Deputy Chief of the Air Force Legal Assistance Division. In the latter role, she served as the Air Force member on the Armed Forces Tax Council. She has additionally served as a Deputy Staff Judge Advocate, Numbered Air Force Chief of Military Justice, and Area Defense Counsel. She deployed as the Staff Judge Advocate for the 16th Expeditionary Support Operations Group and as the Operations Law Advisor for the Stabilization Force, Sarajevo, Bosnia-Herzegovina.

“War is no pastime; it is no mere joy in daring and winning, no place for irresponsible enthusiasts. It is a serious means to a serious end, and all its colorful resemblance to a game of chance, all the vicissitudes of passion, courage, imagination, and enthusiasm it includes are merely its special characteristics.”¹

- Carl von Clausewitz -

Introduction

Major General Carl von Clausewitz’s contributions to the world were not displayed through brilliant military maneuvers on the battlefield, but rather through his thoughts inscribed on paper. Clausewitz published numerous writings based on his lifelong study of history and war, tracing “the interaction of intention and planning with the realities of combat and psychology of the soldier,” and exploring “the relationship of war to policy, politics, and society.”² As “war is a continuation of political activity by other means,” litigation is a continuation of human conflict by other means.³ In this regard, war and litigation share a similar relationship in conflict resolution—perhaps the type of relationship Clausewitz would have sought to explore and think about had he lived in the twentieth century age of litigation. Just as Clausewitz helps the Airman, Soldier, Sailor, Marine, and Guardsman think about war, Clausewitz also helps the trial counsel think about the practice of litigation--both inside and outside of the courtroom.⁴ The study of military strategy, theory and thought provides trial counsel an intellectual foundation from which to pursue their own ideas about litigation. This paper applies Clausewitz’s thoughts and concepts as articulated in *On War*, originally published in 1832, to the practice of litigation in illustrating the value of military strategic thought for trial counsel in planning and executing a

¹ Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 86.

² *Ibid.*, 86-88.

³ *Ibid.*, 87.

⁴ The term “trial counsel” as used in this paper refers to a designated judge advocate in the Uniformed Services serving in either a prosecutorial or defense counsel role in a military court-martial forum.

successful litigation strategy.⁵ This paper is divided into eight main sections. This first section compares and contrasts the nature of war and litigation; the next six sections applies Clausewitz's concepts of the remarkable trinity, psychological forces, friction and fog, attack and defense, decisive points, and culminating point of victory to litigation, and; the final section concludes the paper with a recommendation for judge advocates to include the study of military strategic thought in their respective trial advocacy training program.

On the Nature of War and Litigation

Clausewitz proposed that “war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.”⁶ He further defined war as “an act of force to compel our enemy to do our will,” while referring to “physical force as the means of war to impose one’s will on the enemy.”⁷ Clausewitz went on to state that militaries “use the means of maximum available force,” with the aim of rendering the enemy powerless.⁸ “If the enemy is to be coerced,” Clausewitz stated, “you must put him in a situation that is even more unpleasant than the sacrifice you call on him to make.”⁹

War and litigation are similar in that both seek to resolve conflict of some sort.¹⁰ One major difference is the environment where the conflict is resolved--the battlefield versus the courtroom. A second major difference is the means employed to seek resolution--warfare versus litigation. Nations execute warfare through their military when political conflict cannot be resolved by diplomatic means. Individuals in civil actions, and a prosecutorial body in criminal actions, execute litigation through their legal counsel when conflict cannot be resolved by non-judicial

⁵ This paper selected Clausewitz's thoughts and concepts to illustrate the value of military strategic thought in planning and executing litigation strategy. This is not intended to exclude or minimize the value of other military strategists in comparison to Clausewitz.

⁶ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 87.

⁷ Ibid., 75.

⁸ Ibid.

⁹ Ibid., 77.

¹⁰ Ibid., 149.

means. Clausewitz would likely agree with this assertion as he himself even stated “war is a clash between major interests, which is resolved by bloodshed—that is the only way in which it differs from other conflicts.”¹¹ While the ways and means are different in war and litigation, both seek to achieve resolution by imposition of their will. In fact, the adversarial legal system “developed from the medieval antecedents of trial by ordeal, trial by fire, and trial by combat...[and thus] resonates as a strong, militaristic metaphor for the modern civil trial.”¹²

Trial by combat, also known as “wager of battle,” was a method of conflict resolution utilized by European countries from approximately the 9th century until the 16th century.¹³ Individuals, sometimes litigants in mass, would fight in combat to resolve their legal differences.¹⁴ The victor in combat would win the legal conflict.¹⁵ Litigants facing trial by combat were assigned an individual, commonly known as a squire, to assist in the ceremonial rules of combat with the opposing squire.¹⁶ “Over time, squires would meet and resolve the disputes during negotiations over combat.”¹⁷ The practice of trial by combat for conflict resolution gradually disappeared by the early 18th century as governing bodies realized “too many innocent men were convicted by the practice just for being physically weak.”¹⁸

A similar system that used force for conflict resolution was known as “judicial dueling” or “dueling among nobles.”¹⁹ It survived well into the 20th century in the United States.²⁰ The most famous judicial duel in the United States was between Vice President Aaron Burr and

¹¹ Ibid.

¹² Antonin I. Pribetic, “The Trial Warrior: Applying Sun Tzu’s The Art of War to Trial Advocacy,” *Alberta Law Review*, Volume 45, Issue Number. 4, 2008, 1.

¹³ Joseph J. Ellis, *Founding Brothers* (NY, NY: Alfred A. Knopf, 2001), 20-47; Wikipedia Online Dictionary, “Trial by Combat,” http://en.wikipedia.org/wiki/Trial_by_combat.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Joseph J. Ellis, *Founding Brothers*, 20-47.

Alexander Hamilton in 1804.²¹ In accord with the “customs of the code duello, they exchanged pistol shots at ten paces” in an effort to seek resolution over alleged slanderous statements made by Hamilton against Burr.²² Judicial dueling was outlawed throughout the United States in the mid-1800s in favor of resolving legal disputes through the adversarial system of law, which had been adopted and practiced in the United States since birth of the United States Constitution.²³ Resolution of a legal conflict within the adversarial system of law relies primarily on the skill of an attorney representing his or her client’s interests before an impartial fact-finder.

Just as war is subordinate to the political objective, litigation is subordinate to the client’s objective in the adversarial system as the trial counsel is bound by ethical rules of professional responsibility to zealously advocate on behalf of their respective client’s interests.²⁴ Just as the military warrior must create an effective strategy to achieve their nation’s political objective, the trial counsel must do the same in achieving their client’s objectives. But, all too often, the novice or unenlightened trial counsel lacks the intellectual knowledge of strategic fundamentals and principles necessary to think in strategic terms. This lack of knowledge may result in the trial counsel focusing primarily on the case theory at the tactical level while overly-consumed with checklist management, and thereby creating a huge void in strategic litigation planning and execution. It is important for the trial counsel to truly appreciate the case theory and strategy are two separate, but related functions. The case theory is simply an explanation of what happened.²⁵ The litigation strategy is the way the counsel intends to employ its resources to present the case theory to the fact-finder to achieve the client’s objectives.

²¹ Ibid., 20.

²² Ibid.

²³ Ibid.

²⁴ Air Force Rules of Professional Conduct, Rule 1.3, 1 August 2005.

²⁵ Colonel Timothy J. Cothrel, Chief of USAF Commercial Law and Litigation Directorate, a recognized expert in litigation, offers the following example of a basic case theory: “a crime has been committed, exceptional investigative work has identified the offender; offender is the accused; jury will use their collective judgment to sit,

As litigation proceeds in stages; e.g., pretrial, trial, and post-trial, key decisions of each stage must be linked together through strategy. While resources in war include weapons, personnel, equipment, and so forth, resources in litigation include expert and lay witnesses, testimony, and physical evidence. The decision of how to employ those resources to achieve the client's objectives, along with the employment of discovery, motions, objections, arguments, and jury instructions, as well as the anticipation of opposing counsel's reactions thereto, are all part of a litigation strategy. But, litigation strategy is even more encompassing than that. "The development of successful strategy requires perceptive insight as to what the context is in which one's side may best be presented, meaning the context in which it is likeliest to be accepted by a dispassionate fact-finder. The foundation of successful strategy therefore depends upon insight into the workings on interpersonal relations and the psychology of what attracts people to concepts. These are the insights that one seeks to exploit in improving one's strategic abilities...and ways to overcome the opposing force."²⁶ Finally, because of the diverse and changing nature of litigation, as in war, the trial counsel should plan and execute a strategy designed to the specific nature of the litigation, as also in war.

Remarkable Trinity

With a clearer understanding of the nature of war and litigation, and strategy and case theory, the trial counsel should next think about the "dominant tendencies" of war in an effort to define these in regard to litigation. Clausewitz defined the "dominant tendencies" of war in his "remarkable trinity" concept:

"War is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make war a remarkable

hear, and see the facts; prosecutor will convince jury by proof beyond a reasonable doubt that the defendant is guilty; court will instruct jury to use common sense and knowledge in the ways of the world; and the defendant will merit serious punishment given the gravity of the crimes committed."

²⁶ Frederick L. Whitmer, *Litigation is War* (NY, NY: West Legalworks, 2007). 39.

trinity--composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone.

The first of these three aspects mainly concerns the people; the second the commander and his army; the third the government. The passions that are to be kindled in war must already be inherent in the people; the scope which the play of courage and talent will enjoy in the realm of probability and chance depends on the particular character of the commander and the army; but the political aims are the business of government alone.

These three tendencies are like three different codes of law, deep-rooted in their subject and yet variable in their relationship to one another. A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.

Our task therefore is to develop a theory that maintains a balance between these three tendencies, like an object suspended between three magnets.”²⁷

Clausewitz used the remarkable trinity as the foundation for his theory that the "three magnets" of the remarkable trinity -- blind emotional force, chance, and reason -- had to maintain a balance for successful wager of warfare.²⁸ He used this as a “framework for understanding war's changeable and diverse nature” which could be illustrated in a shift in the balance among the dominant tendencies.²⁹ Like war, litigation is changeable and diverse by its very nature of conflict resolution and the forces unique to each trial. Accordingly, an analogous concept of the remarkable trinity is applicable to litigation in understanding the dynamics which occur within the stages of litigation, and specifically within the battle space of the courtroom.

The first vision that generally comes to one's mind when thinking of the judicial system is the blindfolded lady of justice balancing evidentiary scales. While this vision reflects the burden of proof associated with attaining a favorable verdict, it does nothing to illustrate the forces and their respective characteristics interacting within the courtroom. A more useful vision is a three

²⁷ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 89.

²⁸ Ibid.

²⁹ Ibid.

dimensional, interlocking set of triangles with three aspects. The first aspect of the remarkable trinity of litigation is the judge representing objective reason as an impartial arbiter. The second aspect is the trial counsel in representation of their respective clients and analogous to the “scope which the play of courage and talent will enjoy in the realm of probability and chance depend[ing] on the particular” advocacy and skill of the trial counsel.³⁰ The third aspect is the jury representing the blind emotional force of the community they represent.³¹ Jurors are often referred to as the “conscious of the community.”³² Trial counsel should plan and execute a strategy that considers and maintains an appropriate balance among these three forces. Each trial will be unique as the three forces are all unique in their background, age, education, race, gender, religion, affinity, values, beliefs, opinions and attitudes, and life experiences. These three dominant tendencies will mold and shape the trial while influencing every aspect of the courtroom environment. A trial counsel with the ability to recognize the dynamics and interaction of the forces can affect the trinity’s balance by how they wage the litigation. The goal is therefore to plan and execute a strategy that best harmonizes the trinity in favor of the client’s interests.

An example of the effect a trinity unbalanced by the jury can have on litigation follows: “for many years it was very difficult for a plaintiff to successfully sue a doctor for malpractice because the public’s image of the doctor made it difficult for a jury to come to the view that a doctor should be held to pay damages. With the deterioration of that respect, in certain urban areas it became possible to obtain large awards. Then as public debate grew about the inability

³⁰ Ibid.

³¹ The jury aspect will merge with the judge aspect of the trinity in cases where an accused elects to be tried by a military judge sitting alone.

³² D. Lake Rumsey, ed., *Master Advocate’s Handbook* (St. Paul, MN: National Institute for Trial Advocacy, 1986), 8.

of doctors to obtain medical malpractice insurance, the pendulum shifted again.”³³ In this situation, the trial counsel would first need to recognize the jury aspect of the remarkable trinity was unbalanced because of the social underpinnings of the issue. After having recognized this imbalance, the astute counsel will counterbalance the jury by developing a strategy that presents the case in a socially acceptable manner within community standards. Another jury imbalance example is illustrated by the cliché that even the most winnable case can be lost if tried before the wrong jury. The trial counsel has a responsibility to know the individual and collective characteristics of a potential jury panel in order to select, or rather peremptorily or challenge for cause, jurors likely to unbalance the trinity outside the advantage of the client’s objectives; e.g., defense counsel would seek to challenge persons with similar affinity of the victim, rather than the accused.

The other two aspects of the remarkable trinity of litigation, judge and trial counsel, can likewise affect the trinity’s balance. A trial counsel who is arrogant, overly aggressive, and uncivil can cause the jury, and judge, to dislike him or her. This hostility can fill the juror’s minds with “extraneous information to which they attach unwarranted inferences” ultimately affecting their verdict, either consciously or unconsciously.³⁴ Jurors, as groups in general, will interact with individuals who treat others equitably and withdraw from individuals who treat others inequitably.³⁵ As a result, if a jury is forced to observe and participate in such a relationship, they will be more apt to restore balance to the relationship through their verdict.

Finally, a volatile judge who is impatient, cuts counsel off in an angry tone prior to completion of their sentence, or displays prejudice against one of the counsel or nature of the

³³ Ibid., 29.

³⁴ Loretta A. Malandro and Lawrence J. Smith, *Courtroom Communication Strategies* (NY, NY: Kluwer Law Book Publishers, Inc. 1985), 540.

³⁵ Ibid.

case, affects the trinity's balance. At the one extreme of complete imbalance, a judge has judicial discretion to dismiss a case sua sponte or upon request of counsel for a directed verdict.³⁶ On a lesser level of imbalance, the judge's interaction can cause a trial counsel to lose their courage or boldness to make bona fide objections or approach the bench, or even invoke reactions in jurors such as believing the case is without merit or sympathizing with the berated trial counsel. The properly trained counsel should immediately recognize a potential imbalance and take action such as being extra polite, courteous and respectful to the judge, in an attempt to find balance among the trinity's actors and its forces in the client's best interests.

While others may have contrary views as to what constitutes a remarkable trinity of litigation and its respective relationship, the point is that the remarkable trinity concept, as well as other strategic concepts, provides a construct for trial counsel to think about the relationship and dynamics between opposing counsel and their respective litigants, the jury, and the judge. While thinking about this relationship, the trial counsel will better understand the forces present in litigation, and specifically the courtroom, and how they interact to affect the dynamics and ultimately outcome of litigation, as well as think of ways to control the balance to maintain a healthy equilibrium. The ultimate task is to therefore develop a strategy and employ trial tactics that maintain a balanced trinity. As in any relationship, imbalance eventually leads to disintegration.

Psychological Forces

Similar to the forces of the remarkable trinity, the trial counsel must approach every trial mindful of the psychological elements inherent in litigation. It is this element of human nature

³⁶ While judges should not abuse this discretion and should only dismiss a case upon sufficient cause, case law is replete with examples of abuse of authority.

that “infuses war [trial] with its intangible moral forces.”³⁷ Clausewitz provided that in war “everything is uncertain and calculations have to be made with variable quantities...that all military action is intertwined with psychological forces and effects” and that war “consists of a continuous interaction of opposites.”³⁸ It is Clausewitz’s strong regard for the human element innate within war that causes him to have little use for theory that prescribes mathematical calculations with certainty. Litigation, like warfare, will likewise be shaped by the human nature and peculiarities of the individual litigants, trial counsel, jurors, judge, and witnesses, along with the collective human emotions of each party. As no two wars are ever truly the same, no two trials are the same because people react differently under similar situations. Every trial takes on its own personality because of the peculiar interaction of the remarkable trinity actors and their respective personality, character, judicial temperament. These actors’ interaction is more likely to define the nature of any given litigation than the controversy itself.³⁹ Examples range from the simple to complex. A simple example is that while one trial tactic may force one accused and his defense counsel to negotiate a plea, the same trial tactic in another trial may do the exact opposite and only serve to solidify their resolve to fully litigate all charges. Likewise, a direct approach used successfully by defense counsel to attack the victim’s credibility during cross examination in one trial may evoke sympathy for the victim and bolster her credibility in another trial.

Trial counsel must appreciate that the human element is the most powerful force in litigation, as in war. The term human element is used in its broadest sense including intellect, judgment, reasoning and emotion. “Different interests and a wide variety of passions, good and bad, will arise on all sides. Envy and generosity, pride and humility, wrath and compassion—all may

³⁷ Marine Corps Field Manual 1, *Warfighting*, 6 March 1989, 10.

³⁸ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 84.

³⁹ Frederick L. Whitmer, *Litigation is War*, 36.

appear as effective forces in this great [courtroom] drama.”⁴⁰ Often times, the human element of emotion is a stronger force than even reason and logic, thus requiring the trial counsel to acquire discerning and intuitive skills and judgment to devise and employ trial tactics with this in mind. A more complex example concerns exploitation of the decision-making process whereby people make decisions by emotion, through their unconscious mind, and validate them with logic through their conscious mind. If a trial counsel has studied this decision-making process, they can plan and employ an effective strategy with trial tactics such as using embedded commands designed to “engage the [juror’s] conscious mind while communicating to the[ir] unconscious mind.”⁴¹ A basic appreciation and understanding of psychology and the human elements, along with how and why a particular trial tactic works is critically important for the trial counsel to fashion an effective strategy that strategically employs tactics.

Friction and Fog of War

In articulating his concept of “friction,” Clausewitz recorded, “Everything in war is simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war....Countless minor incidents—the kind you can never really foresee—combine to lower the general level of performance, so that one always falls far short of the intended goal. Iron will-power can overcome this friction...friction, as we choose to call it, is the force that makes the apparently easy so difficult.”⁴² “Fog of war,” on the other hand, is caused by the “inadequacies and inaccuracies of intelligence.”⁴³ Friction and fog of litigation can turn the simplest trial into a complex and difficult one.

⁴⁰ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 188.

⁴¹ Loretta A. Malandro and Lawrence J. Smith, *Courtroom Communication Strategies*, 349.

⁴² Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 119-121.

⁴³ *Ibid.*, 649.

Friction associated with litigation is mental, not physical. As in a heated battle of war, plans during the heat of litigation will go astray by unanticipated objections and rulings on evidence, facts as known to one party will be miscommunicated during cross examination or misinterpreted by the jury, errors in judgment and other unforeseen events will increase the friction of trial and trial may become chaotic, at least in the mind of the trial counsel. Friction may be aggravated by the litigants themselves, opposing counsel, a hostile witness, or self-induced. Self induced friction may be caused by lack of preparation, an incoherent strategy, or lack of training and experience. Self induced friction is perhaps the most debilitating because of its difficulty, if not impossibility, to overcome in the heat of litigation.

A trial counsel generally litigates at all times within some level of fog a they can never truly predict how evidence may be presented or received, or what a witness may or may not say on the witness stand, or how the witnesses' testimony on cross examination might affect their credibility. Additionally, one can never predict with certainty what rulings a judge may issue, thereby affecting the course of their respective strategy. It is this uncertainty of fog that can invade a trial as litigation rarely unfolds in the neat manner the trial brief has been arranged. It is at this moment when friction and fog is at its greatest that the trial counsel must be able to operate in a flexible manner or else they will loose control and command of the courtroom.

The trial counsel strategist, as the soldier strategist, "must...maintain control throughout" in order to direct the proceedings to the client's objective.⁴⁴ According to Clausewitz, "A sensitive and discriminating judgment is called for; a skilled intelligence to scent out the truth" to penetrate the "fog of uncertainty."⁴⁵ It is imperative for the trial counsel to likewise develop a similar discriminating judgment and skilled intelligence that becomes intuitive for the trial

⁴⁴ Ibid., 177.

⁴⁵ Ibid., 101.

counsel to make the right split-second decisions in keeping with their predefined strategic course. Predefined does not mean strategy should be static. To the contrary, strategy must be flexible and fluid enough to anticipate changes in intelligence when the fog has lifted to allow for a change of course when necessary. It is a daunting task to develop a litigation strategy that provides strategic course throughout the inevitable chaos of litigation, yet is flexible enough to allow a change of course in light of an intelligence failure. Trial advocacy training, experience, preparation, and effective use of discovery are instrumental in helping the trial counsel develop the skills necessary to create such a strategy. With an even greater honing of skills, the trial counsel “genius” is able to employ the associated uncertainty of fog to her or his client’s advantage by such actions as manipulating opposing counsel into doubting its chances of success by “encouraging a perception that success is likelier to favor his or her own side” and thus, in turn, convincing the jury of his or her client’s position through opposing counsel’s loss of bearing and lack of confidence.⁴⁶

Attack and Defense

According to Clausewitz, combat manifests itself in war in the two basic forms of attack and defense. He wrote extensively about the relationship between attack and defense in both tactics and strategy and the respective characteristics of each. Clausewitz stated, “defense is the inherently stronger form of combat.” His reasoning in finding defense the stronger form of combat is no doubt difficult to understand for the novice student of Clausewitz thinking. As such, a reliance on Bernard Brodie’s interpretation is appropriate:

“The defense has many opportunities for tactical surprise, but it is the opponent who has moved against him rather than the reverse. The object of the defensive is to preserve, which is a negative object, and therefore follows “that it should be used on so long as weakness compels, and be abandoned as soon as we

⁴⁶ Frederick L. Whitmer, *Litigation is War*, 36.

are strong enough to pursue a positive object.’ This assurance Clausewitz... insists” is “on establishing that the weaker commander adopts the defensive because its inherent strength mostly having to do with the fact that the defender usually enjoys optimum lines of communication and retreat while the attacker is extending his and usually suffering a wastage of strength as he moves forward, and also that the defender chooses to his own advantage the place of contact or engagement. His clinching rhetorical argument is that if it were not the stronger form there would never be any reason for resorting to it.”⁴⁷

The terms attack and defense “are not mutually exclusive as the defensive strategy may not be one of passive resistance, but may assume an offensive character, striking at the “enemy at the moment of his greatest vulnerability...creating a sudden powerful transition to the offensive—the flashing sword of vengeance—is the greatest moment for the defense”⁴⁸ Likewise, the “requirement to concentrate forces at the focus of effort for the offense often necessitates assuming the defensive elsewhere.” The attack, also referred to as the offense, and defense are thus integral components of each concept.⁴⁹

Just as combat manifests itself in two basic forms of attack and defense, litigation is also manifested by two basic forms—prosecution and accused in a criminal action; and plaintiff and defendant in a civil action. The prosecution and plaintiff own the evidentiary burden of proof in both criminal and civil actions, although the burden of production may shift to the defendant in certain circumstances such as an affirmative defense. The traditional purpose of any offensive action is to advance the proposing counsel’s position while the purpose of any defensive action is to deny advancement of the opposing counsel’s position. In application to criminal litigation, the government seeks to impose its will in the form of attaining a guilty verdict by creating enough “force,” or rather weighted evidence, to meet its burden of proof to overcome the presumption of the accused’s innocence. Similarly, the accused, although he or she has no

⁴⁷ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 679.

⁴⁸ *Ibid.*, 370.

⁴⁹ Marine Corps Field Manual 1, *Warfighting*, 6 March 1989, 26.

burden of proof, may passively resist the government's assertion of its force. However, when viewed in Clausewitz's thoughts, both the prosecution-plaintiff and accused-defendant will switch in and out of the attack and defense throughout the course of a trial, just as in a military battle.

Strategic and tactical decisions must therefore be made in light of the anticipated reactions and counteractions of opposing counsel, recognizing that "while we are trying to impose our will on our enemy, he is trying to do the same to us."⁵⁰ In order to do so, however, trial counsel must recognize the elements and characteristics of the offense and defense and specifically know when it is operating in either realm while keeping in mind "the same concepts employed during the offense can be employed during the defense."⁵¹ The effective execution of a prosecution through offensive actions requires the prosecutor to protect any gains already made, thus requiring he or she to simultaneously employ offensive actions in proving the next element, for example, while also taking action to defend any gains. Conversely, a defense counsel of an accused with no burden of proof may choose a strategy of passive resistance to merely defeat the prosecution or may choose an offensive strategy designed to exploit evidentiary weaknesses in the government's case, a faulty strategy, or imbalanced trinity.⁵² An example illustrative of this point is a decision by defense counsel to introduce tangible evidence in the prosecution's case-in-chief as an offensive move, rather than as rebuttal evidence introduced during defense presentation of its evidence. A lesson for defense counsel is to think creatively and look for unique opportunities to counterattack the prosecution, perhaps when it least suspects it during the height of its own offensive in its case-in-chief.

⁵⁰ Ibid.

⁵¹ Frederick L. Whitmer, *Litigation is War*, 206.

⁵² Ibid., 225.

Trial counsel must have knowledge of specific defensive and offensive principles regardless of their role. Any strategy built solely upon offensive or defensive principles is likely to fail as it obviously does not anticipate opposing counsel actions and reactions. A defensive counterattack in litigation, as in warfare, disrupts the offensive momentum and can result in the prosecution falling into a defensive mode to react to the defense offensive. An element of a successful defense may be to take the offensive lead in derailing and thus directing the prosecution's course of action, either through its effective resistance or counterattacks. Through these unanticipated events, trial counsel can additionally create a friction effect to slow the opposing counsel. The ability of trial counsel to recognize they operate in both modes will gain an advantage in planning and executing strategy.

Decisive Points

Clausewitz believed the most common element in victory is “superiority of numbers...can obviously reach the point where it is overwhelming...It thus follows that as many troops as possible should be brought into the engagement at the decisive point....The best strategy is always to be very strong; first in general, and then at the decisive point.”⁵³ Clausewitz's reference to decisive points in war was geographical in nature with specific reference made to waging the attack or defense in the terrain of mountains, rivers and streams, swamps, forests, flooded areas, and so forth. While today's decisive points in warfare, especially in asymmetric warfare and within the cyberspace domain, are broader and include non-geographical decisive points, Clausewitz's reference to decisive points is nevertheless timeless in that the concept can be utilized in other dimensions and to non-warfare enterprises such as litigation.

⁵³ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 195, 204.

The decisive points in litigation will be unique to each case decided by its respective facts and circumstances, composition of the remarkable trinity, and client's objective, ultimately linked through the litigation strategy. The decisive points can serve to form a coherent path requiring one point to be met before venturing on to the next point. In other cases, decisive points may intentionally not be as well-defined to allow for deviant courses of action during litigation. Trial counsel must identify the decisive points in relation of its strength against that of the opposition. For example, if the defense has notified the judge that it intends to enter into a stipulation of fact with the trial counsel and thereby conceding an element of the crime, the prosecutor should not waste effort presenting evidence of that element, but rather should focus its effort on contested points thought to be decisive. Likewise, the defense counsel who recognizes it cannot defend, either through passive resistance or offensive counterattack, against the prosecution's maximum force at a decisive point, should devise a strategy that concentrates his or her forces, or rather effort, at just one decisive point in the government's case, thereby defeating just one element of a charged offense. For example, in a prosecution of an accused charged with committing indecent acts by exposing his penis to his 8 year-old daughter, the prosecution must prove, among other things, the accused committed the act with the intent to gratify his lust or sexual desires. Armed with overwhelming evidence that the accused confessed to exposing his penis to both an investigator and his wife, in addition to the child's eye-witness testimony, the prosecutor thinks he has a slam dunk case and is confident he will meet the government's burden of proof by arguing the accused possessed the requisite intent based on the undisputable facts he exposed his penis to his child. In this situation, the defense should bring all its forces to bear on the one decisive point most susceptible of attack, the accused's intent. In this real-world case example, the accused was acquitted after the jury found he did not display his penis with the intent to

satisfy his lust or sexual desires, but rather did so with the intent of providing sex education to his child, which was elicited to the surprise of the prosecutor during defense cross examination of both the wife and child.⁵⁴ The lesson is that if the defense is not strong anywhere else, bring all strength to bear at one decisive point.

Trial counsel should be especially alert to situations where decisive points of the opposing counsel may not be properly identified or anticipated. For example, during the government's case-in-chief in a prosecution of an accused for assault with a loaded 9mm pistol, the alleged victim, who is also the accused's estranged spouse, testified the accused pointed the gun at her head and then cocked the gun. The police officer who responded to the scene disclosed to defense counsel during a pretrial interview that the weapon was found engaged with a fully loaded clip, but no bullet was chambered in the gun. This testimony was elicited during defense counsel's cross-examination of the police officer. This was the first time the trial counsel had heard this fact as he never questioned the police officer the condition of the gun. Because it is impossible to cock a fully loaded weapon without chambering a round, the defense counsel built their entire defense and counterattack around the case theory that the wife was lying.

Meanwhile, the trial counsel's actions remained static and he wasted his force against collateral matters. This discrepancy in the victim's credibility, coupled with the accused's good military character, became the decisive point adopted by the jury and the accused was acquitted. The prosecutor's case was paralyzed through his inability to respond to the decisive point of the defense's counterattack, which was the point that put the prosecution's power at most risk.

Decisive points should be actively identified at the earliest stages, even before preferral of charges. For example, in a case where the accused is under investigation for burglary and underage drinking, the trial counsel should consider the first, second, and third order

⁵⁴ Albeit the accused used poor judgment in his use of demonstrative aids.

consequences of charging both offenses in relation to creating potentially risky decisive points within the nature, or rather terrain, of that specific litigation. In order to prove the underage drinking charge in this hypothetical, the prosecutor will be required to introduce the accused's written confession because the only other evidence upon which to base the underage drinking charge is an empty bottle of Jack Daniels whiskey found in the accused's car. The accused's confession alleges he was alone on a dark road drinking Jack Daniels and listening to music during the evening of the burglary. While admission of the accused's confession into evidence would probably be sufficient, along with corroboration of the empty whiskey bottle, to convict the accused of the underage drinking charge, admission of the confession will also introduce the accused's alibi defense to the burglary through the government's case-in-chief and without the accused ever having to take the stand to testify. This could result in the unnecessary creation of a decisive point ripe for defense exploitation. A narrowly focused charge sheet on the gravamen of the offense will minimize opportunities for the opposing counsel to create diversions or "flank attacks drawing attention and strength from the main force" of the prosecution.⁵⁵ Predefining, identifying, and preventing decisive points, when applicable, will assist the trial counsel in developing and employing a litigation strategy that correctly positions their respective case for the jury.⁵⁶

Culminating Point of Victory

The discussion of offense and defense linked through decisive points is a natural transition to Clausewitz's concept of "culminating point of victory."⁵⁷ Clausewitz proposed that "victory has a culminating point," of which the offender should not pass because the offensive superiority decreases beyond this point with the offender's decrease of strength equaling the defense's gain

⁵⁵ Frederick L. Whitmer, *Litigation is War*, 291.

⁵⁶ Positioning is a strategic way of thinking with regard to how to present a case in the minds of the jurors.

⁵⁷ Michael Howard and Peter Paret, ed. and trans., Carl von Clausewitz, *On War*, 566.

of strength.⁵⁸ According to Brodie’s interpretation of Clausewitz, “to push beyond this point without a good chance of an imminent favorable decision is dangerous.”⁵⁹ Clausewitz questioned “if all this is true, why does the winner persist in pursuing his victorious course, in advancing his offensive? Can one really still call this a ‘utilization of victory?’ Would he not do better to stop before he begins to lose the upper hand?”⁶⁰ Clausewitz emphasizes the overarching relationship between the culminating point of victory and the strategy for achieving the political objective by stating “Thus the superiority one has or gains in war is only the means and not the end: it must be risked for the sake of the end. But one must know the point to which it can be carried in order not to overshoot the target; otherwise instead of gaining new advantages, one will disgrace oneself.”⁶¹ The culminating point of victory is the point at “which we can no longer sustain the attack and must revert to the defense. It is precisely at this point that the defensive element of the offense is most vulnerable to the offensive element of the defense,—the counterattack.”⁶² Clausewitz’s experience at the Battle of Waterloo and Waivre no doubt attributed to this concept as he watched Napoleon lose all that he had gained.⁶³

In application to litigation and development of trial strategy, the trial counsel must define the culminating point of victory and the means in evidentiary terms necessary to reach it. Careful evaluation of the facts in the perspective of each side is critical in defining this point. A mis-definition could result in falling too long or short of the culminating point. Crossing too far across the culminating point of victory in trial, as in war, can likewise lead to offensive defeat as trial counsel takes unnecessary risk opening up peripheral areas to attack. The challenge is in

⁵⁸ Ibid.

⁵⁹ Ibid., 698.

⁶⁰ Ibid., 570.

⁶¹ Ibid.

⁶² Marine Corps Field Manual 1, *Warfighting*, 6 March 1989, 35.

⁶³ Roger Parkinson, *Clausewitz A Biography*, (Briarcliff Manor, NY: First Scarborough Books, 1979), 288.

developing the judgment necessary to identify that culminating point that to go further would actually weaken the client's position. The trial counsel must resist asking the one additional question to a witness that ended up being the "one to many" that opened the door to allow introduction of previously suppressed evidence; or calling that one cumulative witness that has conflicting testimony on a collateral matter thereby challenging their credibility on a primary issue; or overcharging the case thereby affecting the government's credibility to prove any of the charges; or floundering around in the courtroom with endless and pointless cross-examinations. As in war, it is at this point where either counsel may unnecessarily make its case vulnerable through attacks on peripheral matters or risks infusion of collateral information and jury confusion. The trial counsel, both government and defense, should develop a concept of culminating point of victory in developing its litigation strategy and tactics in pursuit of its client's objectives. The trial counsel who has studied military strategic thought will more accurately identify the culminating point of victory, know when it has reached this point, and have the judgment to stand fast or risk losing gains already achieved.⁶⁴

CONCLUSION

The true significance for any attorney, civilian and military alike, in studying Clausewitz and other great military strategists is to think on a strategic level with an appreciation of the nature of litigation, strategy, theory, and tactics and their respective relationship to one another. The trial counsel should explore and study warfare as a means of developing an analytical framework for their advocacy. Understanding the "remarkable trinity" of war will assist the trial counsel in creating their own philosophy on what forces are present in litigation trial and the interplay and dynamics of these forces, as well as the consequences of one force's magnetic dominance over another. Understanding "psychological forces" and "friction and fog" associated with warfare

⁶⁴ Frederick L. Whitmer, *Litigation is War*, 317.

makes the trial counsel cognizant of similar existing elements and forces in trial so that they can train and equip their mind to operate through the chaos while manipulating the decision-making of others. Understanding that “attack and defense” each have strategic and tactical advantages and may operate simultaneously enlightens the trial counsel to a whole new dimension of thinking about their respective position in litigation. The trial counsel who understands that maximum force applied at just one decisive point can potentially dismantle all subsequent decisive points will give greater value to its exploitation. Finally, the concept of “culminating point of victory” causes the trial counsel to envision what the point of victory will look like, and reflect upon their strategic and tactical decisions in pursuit of their client’s objective in an effort to protect their gains.

There is added value for the judge advocate to think about litigation in the same military concepts as its juror-Airmen, many of whom are graduates of service academies and in-residence professional military education schools, who no doubt filter evidence through a similar military-trained perspective. Trial counsel should establish a particular way of thinking about litigation that traverses the entire litigation process from pretrial to post trial. Every tactical move a counsel makes, whether it is in discovery, charging, or in motion practice, should have a strategic link to its client’s objectives. Decision making at the strategic level requires certain knowledge and skills and intellectual development that empowers them to recognize and analyze the full spectrum of a case in creating and executing an effective strategy. Trial counsel who are cognizant of military strategic concepts will have the capacity to operate at a much higher strategic level in the courtroom. This enhanced strategic level ability is the result of education and training. Accordingly, judge advocates should study military strategic thought in fine tuning their trial advocacy skills.

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